No. 22,050

IN THE

United States Court of Appeals

For the Ninth Circuit

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Appellee.

APPELLANT'S OPENING BRIEF

GRAHAM & JAMES
FRANCIS L. TETREAULT
JOHN A. EDGINTON
310 Sansome Street
San Francisco, California 94104
Attorneys for Appellant
N. V. Stoomvaart Maatschappij
"Nederland"

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JURISDICTIONAL STATEMENT

This is an appeal from an interlocutory judgment in admiralty of the United States District Court for the Northern District of California, the Honorable Albert C. Wollenberg, decreeing equal division between appellant and appellee of damages resulting from the August 29, 1965, collision off the Golden Gate between appellant's freighter "Rotti" and appellee's tanker "J. H. Tuttle."

The District Court filed its memorandum opinion on February 28, 1967, and after submission of Findings, Conclusions and form of judgment proposed by the libelant-appellee, as requested in the court's memorandum opinion (C.T. 161) and modifications proposed by respondent-appellant (C.T. 168), the District Court on May 31,

1967, filed its Findings and Conclusions (C.T. 176) and the Interlocutory Decree (C.T. 182) from which respondent-appellant filed its notice of appeal on June 14, 1967 (C.T. 184), within the time limited by Title 28 U.S.C. §2107 for noticing appeals from interlocutory admiralty decrees.

The District Court had jurisdiction of the action as one of admiralty and maritime jurisdiction under Title 28 U.S.C. §1333; this court has jurisdiction pursuant to Title 28 U.S.C. §§41, 1291, 1294, and 2107.

STATEMENT OF THE CASE

This suit arose out of a collision which occurred in fog at approximately 6:57 p.m. (1857) P.D.T. August 29, 1965, in the San Francisco Entrance Channel between the inbound 492-foot freighter "Rotti" and the outbound 524-foot tanker "J. H. Tuttle."

This litigation was commenced by libelant on September 1, 1965, (C.T. 1) and, up to the time of trial, carried forward by libelant on the factual theory set forth in its pre-trial statement (C.T. 59, 60, 61) that libelant's radar-equipped tanker "J. H. Tuttle" entered the Entrance Channel at its northerly edge just westerly of buoy No. 7 [the arrangement of the Entrance Channel buoys appears in Appendix III, a photocopy of the relevant portion of U.S. Coast and Geodetic Survey Chart 5532, Libelant's trial exhibit 1 (R.T. 6)] and held to the northerly edge, proper for a westbound vessel, on the proper outbound course of 250° T., until the "Rotti" (having inferentially crossed to the north or wrong side

of the channel for an eastbound vessel), appeared out of the fog off the "Tuttle's" port bow, coming into collision just easterly of buoy No. 6. Libelant abandoned these factual contentions at the commencement of trial, conceded fault on the part of the "J. H. Tuttle" (R.T. 5), and admitted that the "J. H. Tuttle" had navigated in the manner described by the "Rotti" witnesses (R.T. 6) and, incidentally, in the manner confirmed by the testimony of the two independent witnesses, Navy flyer Scott B. Wilkes (R.T. 130) who was overhead at the time, and tug captain W. D. McClean who observed the events leading to the collision on the radar of his tug which was near buoy No. 8 at the time of the collision.

The collision occurred on the south, or "Rotti's," side of the channel between buoys 4 and 6 but closer to buoy No. 4. Prior to entering the Entrance Channel the "Rotti" had reduced from her full sea speed of 80 rpm or about 16½ knots (R.T. 33) to her "full" maneuvering speed of 60 rpm or approximately 12 knots (R.T. 34, C.T. 178) and, commenced fog signals having sighted fog ahead between buoys 2 and 4, (R.T. 172).

There was an ebb tide of 3½ knots (C.T. 178), which reduced the "Rotti's" speed over the ground to approximately 8½ knots, and the "Rotti" entered the channel close on her proper, south side and on the proper channel entrance heading of 70° T. at 6:47 P.D.T. (1847 hours) (C.T. 178). Her engine speeds from 1852 until the collision at 1857 were stop and full astern except for one minute on half ahead and a short period (recorded as ½ minute in Lib. Exh. 6) on full ahead [when the "Rotti's" radar observations confirmed that the "Tuttle" had

completed her transit across the channel from north to south and was outside the channel south of buoy 6] (R.T. 196, 197 through 198 line 21). At 1854 the "Tuttle" hesitated in her southerly progress away from the "Rotti," so the "Rotti" went full astern (R.T. 201); but, as the "Tuttle" appeared to be staying outside of the channel (R.T. 201) going westerly and parallel to the channel (R.T. 28, 29), the "Rotti" put her engines on stop as a further cautionary move. A moment later at 1856 when the "Tuttle" was seen to commence a right turn back into the channel, the "Rotti's" engines were put on emergency full speed astern. The "Rotti" sighted the "Tuttle" coming out of the fog in a hard starboard turn shortly before the "Rotti's" bow made contact with the port bow of the "Tuttle" at 1857.

Appellant-respondent proceeded with the trial in the District Court following the concession of fault on the part of the "J. H. Tuttle" in furtherance of its position that the grave fault of the "J. H. Tuttle" fully accounted for the collision, and, as the "Rotti" had navigated competently and cautiously, that additionally, under the American rule, sometimes ineptly called "major-minor," fault would not be ascribed to actions of the "Rotti" navigators which represented reasonable judgment at the time, even though other mariners with hindsight might have done differently.

Appellant-respondent further contended the fault of the "J. H. Tuttle" was so overwhelmingly great as to require any technical fault or debatable error of judgment on the part of the navigators of the "Rotti" to be excused under the equitable application of the "major-minor fault" rule.

Alternatively, appellant-respondent contended that damages be decreed divided in proportion to the relative degrees of fault (C.T. 144, 174) in accordance with the rule prevailing in other maritime nations, recognizing that recently there have been substantial authoritative suggestions that American law permits collision damages to be divided in proportion to fault.

Libelant-appellee proceeded with the trial contending that the gravity of the "Tuttle's" fault was irrelevant and that any fault that could be found against the "Rotti," *however slight,* required the Court to divide damages equally (C.T. 36, 160). The District Court, agreeing with libelant, found the "Rotti" guilty of contributing fault and decreed equal division of damages. In so doing, it appears that the District Court:

(1) accepted the contention of libelant that it is fault as a matter of law for a vessel to enter fog at "full" maneuvering speed, despite an alert radar watch with plotting (R.T. 381, line 16);

(2) accepted the contention advanced by libelant-appellee that as a matter of law the "major-minor fault" rule does not apply to a claimed violation of Rule 16(a) (R.T. 402, lines 12-17);

(3) judged the actions of the "Rotti" against the requirements of Title 33 U.S.C. §1077(c) (C.T. 180), although this statute was not in effect at the time of the collision;

(4) was of the opinion that American law affirmatively requires damages to be divided equally in all "mutual" fault collision cases (C.T. 160); and,

(5) in view of the several references to the "kicking" ahead of the "Rotti's" engines, accepted the urging of libelant's counsel that *Afran Transport Company v. The Bergechief* (S.D.N.Y. 1959) 170 F. Supp. 893 related to Rule 16(a) rather than to Rule 16(b) (C.T. 160, C.T. 180).

SPECIFICATION OF ERRORS

The District Court erred:

1. In finding, concluding and decreeing that appellant's vessel "Rotti" was guilty of negligence which contributed to the collision and liable for one-half of the damages resulting therefrom;

2. In failing to find and conclude that the collision was caused by the major and gross navigational faults of the "J. H. Tuttle" and that the faults, if any, of the "Rotti" were under the "major-minor fault" rule embodied in American law, minor and noncontributory;

3. In failing to decree (with corresponding findings and conclusions) that damages be divided in proportion to the relative fault of each vessel;

4. In finding and concluding (Conclusion No. 2, C.T. 180) that the "Rotti's" 12 knot speed on entering fog was immoderate and in violation of Rule 16(a);

5. In finding and concluding (Memorandum Opinion, C.T. 160, incorporated by reference in Findings, C.T. 180, and in Conclusions, C.T. 181) that the law required the "Rotti" to stop, and remain stopped, from her first radar sighting of the "Tuttle";

6. In finding and concluding (Conclusion No. 3, C.T. 180) that a collision would not have happened if the "Rotti" had remained at stop after 1852;

7. In finding and concluding (Conclusion No. 4, C.T. 180) that the "Rotti's" "kick" of her engines to full ahead less than five minutes before the collision was imprudent and a fault without which the collision would not have happened;

8. In concluding (Conclusion No. 5, C.T. 180) that 33 U.S.C. §1077(c)—which was not effective until September 1, 1965, after the collision—was applicable to the "Rotti" as a standard of care;

9. In finding (Finding No. 10, C.T. 179, and Memorandum Opinion, C.T. 159, as incorporated by Finding No. 11, C.T. 180) that the "Rotti" had forward headway through the water at the time of collision;

10. Failing to find that the unexplained and unexcused failure of the libelant-appellee to produce any of the "J. H. Tuttle's" witnesses raised a presumption in favor of the validity of the testimony of the witnesses aboard the "Rotti", as against the testimony of the expert witness produced by libelant-appellee, on the question of whether the "Rotti" was stopped dead in the water at the time of collision (C.T. 179, Finding 10);

11. In finding (Finding No. 9, C.T. 179) that the "Rotti" brought her engines to half ahead and then to full ahead at a time when her radar observation indicated that the "Tuttle" was proceeding "westerly on the south side of the channel." [The evidence is that the "Rotti" went half ahead when the "Tuttle" had moved

to the south side of the channel and was continuing to head south out of the channel (R.T. 196, 197) and gave full ahead when the "Tuttle" had reached a point to the south outside of the channel and appeared to be moving south (R.T. 198)]; and

12. In finding (Finding No. 9, C.T. 179) that "at 1854½ hours when her speed was still nearly 12 knots, the "Rotti" put her engines at stop and then to full astern because her radar observations now showed the "Tuttle" to be turning back into the channel" [the evidence being that the full astern at 1854½ hours was ordered when the "Tuttle" was seen simply to have stopped her progress to the south, there at this time being no indication that the "Tuttle" was turning back into the channel (R.T. 199, 200, 201)].

STATUTES AND RULES INVOLVED

The pertinent statutes are Rule 16(a) and (b) and 25(a) of the International Rules for Prevention of Collisions at Sea, Title 33 U.S.C. §145n and 146i. These statutes are set forth in full in Appendix II, together with the statutes referred to by the District Court which did not become effective until September 1, 1965, after the collision, Title 33 U.S.C. §1077, 1094.

SUMMARY OF ARGUMENT

The "J. H. Tuttle" was clearly and admittedly guilty of extraordinarily negligent navigation.

The finding and conclusion of the District Court that the carefully and skillfully navigated "Rotti" was guilty of substantial contributing fault which required it to order the "Rotti" to bear a full one-half of the total collision damages was the result of misapprehension that the law, in several of its aspects, required it to take the action it did.

The critical findings and conclusions were dictated by the District Court's belief, which we submit was erroneous in each instance, that, as a matter of law:

(1) the "Rotti" was guilty of an immoderate speed in violation of Rule 16(a) in entering fog at a "full" maneuvering speed of 12 knots (8½ knots over the ground) such that she could not be brought to a stop within one-half the range of visibility, even though she was equipped with an efficient alertly manned radar;

(2) that Rule 16(c), although not then in force, imposed a standard of care which required the "Rotti" to stop engines and remain outside on first observing the "Tuttle" on radar;

(3) that the "kick" ahead of the "Rotti's" engines at 1852½, although no fog signal had been heard from the "Tuttle", was a violation of Rule 16(a), even though *Afran Transport Company v. The Bergechief* (S.D.N.Y. 1959) 170 F. Supp. 893, cited in the Memorandum Opinion, deals with a situation under Rule 16(b); and

(4) that the "Rotti", despite the grossly faulty navigation of the "Tuttle", was not entitled to the benefit of the so-called "major-minor fault" rule announced in the *Great Republic* (1875) 90 U.S. 20 and subsequent cases in gauging whether her speed was moderate for the purposes of Rule 16(a).

The District Court, having accepted the urgings of "Tuttle" counsel that the law did not permit it to give the "Rotti" the benefit of the "major-minor fault" rule, the Court then felt the law required it to divide the total collision damages equally, disregarding the staggeringly great fault on the part of the "Tuttle". The Court reached this conclusion in spite of the fact that all maritime jurisdictions which do not have a leavening "major-minor fault" rule accomplish an equivalent result by dividing damages in proportion to fault. As discussed in *McKeel v. Schroeder* (N.D. Cal. 1963) 215 F. Supp. 756, which decreed a proportional division of damages, there has been no direct holding of the United States Supreme Court which precludes a division of damages in proportion to fault.

A number of the foregoing questions of law, including some of those relating to radar, have not previously received the direct attention of any American appellate court. These basic legal questions relate to undisputed facts, and if determined in the "Rotti's" favor will be determinative of the appeal.

Appellant has cited as error a few factual points dealing with the navigational maneuvers of the "Rotti" with

respect to the "Tuttle" as to each of which the error of the trial court is clear. For example, when the "Rotti" "kicked" her engines full ahead at 1853½, her radar observation indicated that the "Tuttle" had then completed her crossing of the channel and was continuing to head south (R.T. 198), *not* that the "Tuttle" was then proceeding westerly on the south side of the channel, as indicated in Finding No. 9 (C.T. 179).

None of the factual decisions which appellant has cited as erroneous were of critical importance in the view the District Court took of the governing law, but a correct account of the "Rotti's" performance, as illustrated in Appendix IV, demonstrates the quite exceptional caution with which the "Rotti" was navigated. For example, although it is of virtually no legal significance whether the "Rotti" was fully stopped in the water at the time of collision, the factual context in which the case is presented is somewhat distorted by what we submit to be the error of the District Court in finding that the "Rotti" had forward headway (C.T. 179) based on the equivocal testimony of an expert produced by the "Tuttle", especially in view of the fact that none of the eyewitnesses on board the "Tuttle" were produced, as against the clear and candid testimony of the "Rotti's" navigators (R.T. 212, 344, 345).

ARGUMENT

I. MODERATE SPEED IN FOG

A. The so-called "half-sight" rule is not applicable to a vessel which is efficiently using radar.

Rule 16(a), by its terms requires vessels navigating in fog to "go at a moderate speed, having careful regard to the existing circumstances and conditions."

This Court, in the *Beaver* (9 Cir. 1918) 253 Fed. 312, 314, 315 correctly held that the "moderate speed" required by the rule does not necessarily mean a reduced speed; the "Beaver's" full sea cruising speed was 8¼ knots.

Other decisions of this Court, dealing with vessels which were not equipped with radar, have indicated that for purposes of the moderate speed requirement, vessels should not proceed in fog at a speed at which they cannot be stopped dead in the water in one-half the range of visibility. See, *The Silver Palm* (9 Cir. 1937) 94 F.2d 754, 757, and argument as presented to the District Court in the briefing on behalf of the "Tuttle" (C.T. 93, 94). A number of cases in the Second Circuit have defined moderate speed as a speed at which the vessel can be stopped within its full range of visibility. These "rules" whether "half-sight" or "full-sight" visibility, were aptly placed in their proper perspective by Judge Medina, in the case of *Polarusoil/Sandefjord* (2 Cir. 1956), 236 F.2d 270, *cert. den.* 352 U.S. 982, stating:

> "But these are not rules of thumb to be applied willy-nilly. They are but glosses upon the basic rule requiring operation at a moderate speed, and, like it, they must be applied according to the particular circumstances of each case."

It should be abundantly clear that the information obtained and obtainable from an efficient and alertly manned radar, as was the "Rotti's", is an "existing circumstance" which is to be given consideration in determining whether or not a given speed is "moderate" under Rule 16(a). The second sentence of paragraph (2) of the "Radar Annex to the Rules" (33 U.S.C. §1094, see Appx. II) expressly provides that information obtained from the use of radar is one of the circumstances to be taken into account when determining moderate speed. [Although the "Radar Annex" was not embodied in statute until after the collision in question, it, unlike Rule 16(c), was promulgated for immediate use by the experts who constituted the Safety of Life at Sea Convention because the Annex embodied practical recommendations to be followed by mariners in using radar (C.T. 175)].

Although there are, of course, some unusual circumstances in which information of hazards made known by radar will dictate an even lower "moderate" speed than would be the case in the absence of such information, it is patent, however, that radar is an assistance to navigation and as such is a circumstance which normally permits a vessel to proceed in fog at a speed higher than would be deemed moderate without radar information.

To some extent, it appears that the "Rotti" is the victim of a verbalism. The 12 knot speed under consideration was denominated "full" speed, although in fact it represented a reduction of 4½ knots from the regular sea speed of 16½ knots (R.T. 33) and amounted to only 8½ knots over the ground after subtracting the effect of the 3½ knot ebb tide (C.T. 118).

[In this day, with airplanes navigating at 600 knots, landing at 120 knots through clouds and other conditions of reduced visibility, using essentially the same radar aids employed by the "Rotti", it is clear that the "Rotti's" modest 12 knots, reduced by stop engines and full astern, cannot be deemed immoderate *per se*. Marine navigation, in the circumstances of this case, just as safe air navigation, depends on keeping to assigned channels, and it was the "Tuttle's" gross violation of the narrow channel rule (Rule 25) which was the sole cause of this collision. *Victory/Plymothian* (1897) 168 U.S. 410.]

The libelant-appellee urged, and it is evident that the District Court accepted the view which we submit is clearly incorrect and in direct conflict with this Court's ruling in the *Beaver* (9 Cir. 1918) 253 Fed. 312 that efficient use of radar is not a circumstance which may be considered to modify the "half-sight" rule.

B. The "Rotti" is entitled to the benefit of the "major-minor fault" rule in gauging whether her speed was moderate.

The libelant-appellee urged the proposition, which was accepted by the District Court (R.T. 402, lines 12-17), that the so-called "major-minor fault" rule is not to be applied to the benefit of a vessel such as the "Rotti" in determining whether her speed is moderate under Rule 16(a).

It is fundamental and long established that the determination of "moderate" speed depends upon the circumstances and that considerable weight is to be given the judgment of the vessel's navigators. As was stated in *Lie v. San Francisco and Portland SS Co.* (1917) 243 U.S. 291, 296:

"The most cursory reader of this rule [Rule 16] must see that while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog, renders it not necessary to dwell upon the purpose and obvious wisdom of this second paragraph of the rule."

Contrary to the contention of libelant-appellee, the lassic pronouncements of the "major-minor fault" rule o indeed appear in cases in which the fault claimed gainst the exonerated vessel was immoderate speed nder conditions of reduced visibility:

he Umbria (1897), 166 U.S. 404, 409, 421:

"Indeed, so gross was the fault of the *Umbria* in this connection that we should unhesitatingly apply the rule laid down in *Alexandre v. Machan,* 147 U.S. 72, 75, and *The Ludvig Holberg,* 157 U.S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor. . . . The court is therefore unanimously of opinion that the damages should not have been divided. The majority think that the *Iberia* was not in fault, while other members of the court rest their conclusion upon the view that, even if she were in fault, such fault did not contribute to the collision."

[The fault claimed against the *Iberia* was that of using a right rudder, and continuing at four knots, on first hearing (in an unascertained position) the fog signal of the Umbria in a dense fog; and then putting her engines Full Speed Ahead on sighting the

Umbria through the fog—in claimed violation of the injunction in the then Article 18 that "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."]

The Ludvig Holberg (1895), 157 U.S. 60, 67:

"She was clearly not bound to stop solely on account of the fog; and if she had been running dead slow for four or five minutes before the collision, she cannot be held in fault for what her previous speed may have been. If she ran twenty miles an hour down to the Narrows, and was running dead slow at the time she first heard the tug's whistle, fault could not be imputed to her for her previous speed . . . . As we said in *Alexandre v. Machan,* 147 U.S. 72, 85, 'Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel.' "

[The statutory faults claimed against the *Ludvig Holberg* were "that considering the state of the weather, the steamer was not proceeding at the moderate rate of speed required by law in foggy weather, and did not take prompt measures by stopping and reversing to avoid a collision."]

As appears in the foregoing classic statements of the American Rule, in a case such as the present where the "Tuttle's" flagrantly reckless navigation so fully explains the collision, and may well have placed it beyond any power of the "Rotti" to avoid, it was error to fail to resolve in the radar-equipped "Rotti's" favor whatever

minor doubt there may have been concerning the moderateness of her quite normal speed on entering the fog.

C. The "kick" ahead of "Rotti's" engines at 1852½ hours violated no rule, the "Tuttle" having sounded no whistle.

The libelant-appellee urged the Court that the kick ahead of the "Rotti's" engines, after she had been on stop, was a fault as bearing on whether her speed was moderate and relied on the holding in *Afran Transport Company v. The Bergechief* (S.D.N.Y. 1959) 170 F. Supp. 393 (C.T. 100). This urging was accepted by the District Court in its Memorandum Opinion (C.T. 160), and carried forward into the District Court's conclusions of fault (C.T. 180), despite respondent-appellant's advices as to the true nature of the holding in the *Afran Transport* case (C.T. 172).

In the *Afran Transport* case, "The Bergechief," proceeding in fog and approaching a light vessel, stopped her engines, heard the fog signal of the vessel with which she subsequently collided whose position had not been ascertained and then kicked her engines ahead. The kicking ahead of her engines the Court necessarily found to be a fault as it was an admitted violation of the direct injunction of Rule 16(b) that engines be stopped on hearing forward of the beam the fog signal of a vessel whose position has not been ascertained. The distinction between the imperative mandate of Rule 16(b), violated by "The Bergechief," which removes all discretion from the navigator and the Rule 16(a) requirement of moderate speed, left in large measure to the judgment of the navigator, has its definitive statement in *Lie v. San Francisco and Port-*

land SS Co. (1917), 243 U.S. 291, 296, quoted above at page 15.

II. THERE IS NO NAVIGATIONAL OR STATUTORY BASIS FOR THE DISTRICT COURT'S CONCLUSION THAT THE "ROTTI" SHOULD HAVE REMAINED STOPPED FROM HER RADAR OBSERVATION OF THE "TUTTLE" AT 1852 ON TO THE COLLISION TIME OF 1857.

A. The navigational circumstances.

Appendix IV accurately details the navigation of the "Rotti" with relation to the "Tuttle," giving appropriate references to the record. The description of the "Rotti's" navigation, as given in the District Court's Finding No. 9 (C.T. 179) is a bit garbled, but there is no dispute or confusion concerning the fact that the "Rotti" stopped her engines at 1852 when her radar disclosed that the "Tuttle" had proceeded southerly beyond mid-channel (R.T. 194), the "Rotti" having previously expected that the "Tuttle" might turn westerly in the north half of the channel as would be usual for an outbound vessel.

The "Rotti's" engines remained stopped from 1852 until they were put half ahead, at 1852½, or at 1853. (Libelant's Exh. No. 2 or libelant's Exh. No. 6). At the time the engines of the "Rotti" were put on half-ahead and full-ahead, the "Tuttle" had proceeded across the channel and was heading south. The testimony of Pilot Sever on the subject appears in the Reporter's Transcript, at page 196, line 14 through page 197, at line 11, as follows:

> Q. Why did you give half ahead?
>
> A. Because the target had now moved from the middle of the channel to where it was now on my starboard bow.
>
> * * * * * * *

Q. That was on your starboard bow. How far on your starboard bow?
A. I think she was about a mile and a tenth ahead of me and a couple of degrees on the starboard bow moving away.
Q. Moving away?
A. Meaning the angle was getting larger.
Q. Meaning the angle off your starboard bow was getting larger?
A. That's right. So that she was approximately—
Q. When you gave the half ahead, and you represented on the chart here that she's just at the southerly boundary, she was what, one or two degrees off your bow?
A. She's about five degrees off the bow then.

And Captain Sever's testimony on the circumstances of he full-ahead ordered at 1853½-1854 appears on page 97, line 24 through page 198, line 21 of the Reporter's Transcript, as follows:

Q. What was your next engine command?
A. Then I went full ahead.
Q. Where was the TUTTLE?
A. He was outside the channel.
Q. Okay, make a circle.
A. (Witness complying.)
Q. And would you label that K.
A. (Witness complying.)
Q. And what was the bearing of the TUTTLE from the ROTTI at that point?
A. About 85.
Q. That's—
A. About 15 degrees on the starboard bow.
Q. 15 degrees on the starboard bow. And you were—can you put where you were—excuse me—

A. Just gave it to you there, approximately right here (indicating on chart).
Q. You'd still be in about the same position—
A. Just about the same position here.
Q. All right. Why did you ring full ahead?
A. I figured he was in the clear, that he was going south, that he was on the outside of the channel. He crossed over, he's going south, he's going to be clear.

There is no contrary or conflicting testimony and the "Rotti" witnesses' description of the maneuvers of the "Tuttle" was admitted by "Tuttle" counsel (R.T. 6).

The District Court in its Conclusions 3, 4 and 5 (R.T. 180) indicated its legal conclusion that Rule 16(c), 33 U.S.C. 1077(c), although not effective as a statute, imposed a mandatory duty on the "Rotti" to remain with her engines stopped, even though no fog signal had been heard from the "Tuttle" and even though the "Tuttle" had completed her crossing of the channel and was proceeding south outside of the channel.

Although we agree, and have urged, that the Radar Annex, (33 U.S.C. §1094), embodying the recommendations of experts in the subject, is a proper reference for a standard of care, we submit that Rule 16(c) which is designed to form part of a cohesive system of arbitrary rules of the road to be followed by all vessels, may not be so applied prior to its effective date as a statute.

The fact that Rule 16(c) was not properly applicable to the "Rotti" as statute or otherwise is not, we submit, inconsistent with appellant's view that the navigation of the "Rotti" was proper under Rule 16(c), if that rule is properly construed and applied. Specifically, the "Tut-

le's'' completion of her north-south transit of the ''east-vest'' channel and then proceeding southerly after she vas outside of the channel, within the meaning and word-ng of Rule 16(c), terminated that ''danger of collision'' vhich existed when the ''Tuttle'' was crossing ahead of he ''Rotti,'' and with reference to which the ''Rotti'' ad stopped her engines.

. The law as stated in the leading case most nearly in point.

United States v. Shaw, Savill & Albion Co. (The SS Jeorge N. Seger/SS Waipawa (2 Cir. 1949) 178 F.2d 849 s the only reported case we have been able to find which escribes the navigation of any vessel approaching the nept seamanship demonstrated by the maneuvers of the 'Tuttle'' in this case.

The ''Seger'' at night and showing only her red light o the ''Waipawa,'' crossed ahead from the ''Waipawa's'' ight to left and the ''Seger'' then made successive turns o her own left which brought her into collision with the 'Waipawa.'' It will be noted that the ''Seger's'' maneu-ers are almost identical to those of the ''Tuttle'', ex-ept that the ''Tuttle'' crossed the ''Rotti's'' bow from eft to right and the ''Tuttle'' then used a right turn to ring her into collision with the ''Rotti.'' The similarity f the facts and issues in the two cases renders peculiarly ppropriate the following excerpts from Judge Learned Hand's opinion exonerating the ''Waipawa'':

at 851:

> ''The Seger has the burden of proving the Waipawa's fault, and, since she was herself grossly at fault, that burden is more than ordinarily heavy.'' [Citing *The Victory,* 168 U.S. 410.];

at 851-52:

> "The question is not whether anything prevented her from giving The Seger a wider berth, but whether anything called upon her to assume that a wider berth was necessary. We are to consider the situation as it appeared from The Waipawa's bridge. She saw a vessel cross her bows when the two ships were at least a mile apart. The vessel was on a course, which, had she kept it as was her duty, would have put nearly two lengths of The Waipawa between them when they passed. The Waipawa had therefore certainly fulfilled her duty to 'keep out of the way' as things stood.";

at 852:

> "It would be wholly unfair to assume that she should have anticipated so mad an antic on The Seger's part.";
>
> "On the other hand, as we have already said, The Seger had an unusually heavy burden of proof, and she did not call any witnesses to show that the bank of city lights will not have the effect which The Waipawa's witness said that they did."

It is patent that the District Court's conclusion that the "Rotti" should have remained with her engines stopped from 1952 until after the "Tuttle" had "passed her safely" does not represent a legal standard properly applicable to the "Rotti"; any such standard or rule legally applicable to the "Rotti" must be equally applicable to the "Tuttle" and to all other vessels, and it is obvious that vessels could never pass if all vessels had imposed upon them the duty on non-movement which the District Court imposed on the "Rotti."

We submit that the "Tuttle's" hard starboard turn, like the "Seger's" left turn, was "so mad an antic" as to be unpredictable and renders without support of any kind the District Court's stated conclusions that the collision would not have happened if the "Rotti" had left her engines on "stop"; there is no evidence whatever of what the "Tuttle" would have done if the "Rotti" had remained stopped.

II. IF THE "ROTTI" IS GUILTY OF FAULT OF WHICH SHE IS NOT RELIEVED BY THE AMERICAN "MAJOR-MINOR FAULT" RULE, DAMAGES SHOULD BE DIVIDED IN PROPORTION TO THE DEGREE OF FAULT OF EACH VESSEL.

The "Rotti", as appears from a review of the record, as summarized in Appendix IV, was navigated with unusual care and competence, and there is no aspect of her manning, management or navigation which requires apology. The most that the "Tuttle" was able to say against the "Rotti" related to the two areas, peculiarly within the discretion of the navigators, in which through the exercise of hindsight it was claimed that the "Rotti" navigators should have exercised their judgment in a different manner; namely with respect to the "Rotti's" speed on entering the fog and the "Rotti's" determination that the "Tuttle", having completed passing ahead, was clear. For the reasons discussed in the opening section of this brief, the first claim is without foundation and the second claim, under the standards discussed by Judge Learned Hand in *United States v. Shaw, Savill & Albion Co.* (2 Cir. 1949) 178 F. 2d 849 is nothing more than a complaint that the "Rotti" navigators lacked prescience.

Such factors do not constitute contributing fault.

It is submitted, however, that even if the aspects i which the "Rotti" navigators exercised their judgmen in a manner different from that which the "Tuttle' claims they should have exercised it, such variances wer so minor and the prospect that they in fact contributed t the collision are so conjectural and the occurrence of th collision is so fully explained by the "Tuttle's" ow final "mad antic" maneuver, that any such "fault" o the "Rotti" should properly be overlooked and full dam ages assessed against the "Tuttle" under the America Rule, sometimes called the "major-minor fault" rule.

Although the American Rule takes several forms in it application, the effect of the rule is to avoid the injustic which would result from requiring a vessel, such as th "Rotti", to bear a full one-half share of collision dam ages where it is doubtful that she committed any faul and, at worst, the contribution of any such fault wa entirely venial.

The nature and the effect of the rule is stated in GRIF FIN ON COLLISION, at page 505, as follows:

> "Sec. 224. *Major and Minor Faults.* It sometime happens that a collision was due to the gross and in excusable fault of one vessel, whereas the other' fault was doubtful and, at all events, slight. Unde such circumstances, it may be unjust to divide th damages equally, as the American law requires i cases where both are to blame. Of course, when th other vessel actually was guilty of substantial con tributing fault, both vessels must be held; but, whe the fault of one was flagrant and was the real caus of the collision, the courts are inclined to hold eithe

(1) that they will not inquire too closely into the conduct of the other and that any doubts will be resolved in her favor; or (2) that her fault was not contributory; or (3) that a slight fault will be wholly disregarded. The rule excusing error *in extremis* may be regarded as one manifestation of this principle."

The District Court in the present case erroneously accepted the view urged upon it by libelant-appellee that he "major-minor fault" rule could not apply to the benefit of the "Rotti" by reason of the nature of the faults hich the "Tuttle" asserted against the "Rotti" (R.T. 02).

If, contrary to appellant's contentions, this Court should nd that there is legal support for the District Court's onclusions that the "Rotti" was guilty of contributing ault and was not entitled to the benefit of the "major-inor fault" rule, it is submitted that the District Court rred in failing to require the "Tuttle" to bear a share f the total collision damages more nearly commensurate ith the "Tuttle's" flagrant conduct.

Although it has frequently been said that the American Rule requires collision damages to be divided equally here mutual fault has been found, a close analysis of he decisions of the United States Supreme Court on the ubject discloses that there has been no direct adjudication by the Supreme Court which requires collision damges to be divided equally and that the state of American ase law is entirely receptive to the division of collision lamages in proportion to fault, as is the rule in all other naritime nations of the world. We cannot do better on his subject than to respectfully refer this Court to the

very able and detailed analysis of the state of American law on the subject as given in Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases* (1957) 45 Cal. L. Rev. 304; *McKeel v. Schroeder* (N.D. Cal. 1963) 215 F. Supp. 756, and *Paterson v. City of Chicago* (N.D. Ill. 1962) 209 F. Supp. 576, *rev'd on other grounds* (7 Cir. 1963) 342 F. 2d 254.

The percentage allocation of fault which a litigant in the situation of the "Rotti" owner may be permitted to bear without leaving an impartial observer with the overriding realization that an injustice has been done, is so small as to further fortify the conclusion, which we submit is overwhelming, that justice requires that the "Rotti" be exonerated.

IV. THE SEVERAL CLEAR ERRORS OF THE DISTRICT COURT AS TO NAVIGATIONAL FACTS, ALTHOUGH NOT ESSENTIAL TO THIS APPEAL, DEMONSTRATE THAT THE DISTRICT COURT IMPROPERLY IMPOSED ON THE "ROTTI" THE BURDEN OF PROVING FREEDOM FROM FAULT.

The description of the navigation of the "Rotti" with respect to the "Tuttle" as given in the Court's Findings Nos. 9 and 10 (C.T. 179) is garbled and inaccurate. An accurate presentation of the relative navigational facts, with references to the record, appears in Appendix IV. The evidence is uncontradicted and undisputed, and the several respects in which the Court's findings differ from the record are clear error.

Although there was considerable argument on the subject of the nature of the movement of a turning vessel through the water, the District Court's conclusion that a

ollision would not have occurred if the "Rotti" had ept her engines on "stop", probably was contributed to y the District Court's acceptance of the physically false rgument advanced by libelant-appellant that there is no deways component to the movement of a vessel through ie water after the vessel is well into a turn and *there-ore* that it was physically necessary for the "Rotti" to *ove within* the "Tuttle's" turning circle for the collision occur (R.T. 467). In fact, there is a substantial slew-g, sideways component to the motion of a vessel through ie water at every point of her turning circle, and the ollision between the bows of the two vessels could have esulted solely from the movement of the "Tuttle", with ie "Rotti" dead in the water at any point tangent to the irning circle circumscribed by the "Tuttle's" bow, as iown to the Court by the excerpts from Knight on Modern Seamanship" (C.T. 155 c, d and e).

One other related point, minor in itself, but worthy of ention by way of example, is the District Court's Find-g No. 10 (C.T. 179) that the "Rotti" had forward head-ay through the water at the time of collision.

This finding is contrary to the testimony of the Rotti's" pilot (R.T. 212) and of the "Rotti's" master R.T. 344, 345) and is purportedly based on the testi-ony of witness Guralnick, whose testimony was pro-uced as expert on behalf of the "Tuttle", even though ie "Tuttle" did not produce any of the "Tuttle" navi-ators who were present at the collision or attempt to ccount for their non-production. It is only incidental iat expert Guralnick himself testified that a vessel such s the "Rotti" proceeding at the "Rotti's" 60 rpm

or 12 knots could be brought to a stop in the wate through working her engines full astern for 1½ or 2 min utes (R.T. 308) while the record shows (Lib. Exh. 2) tha the "Rotti" worked her engines full astern for a ful two minutes during the relevant period commencing, no at 12 knots through the water, but with a speed throug the water which even witness Guralnick's own chart (Lib Exh. 8) indicated had been reduced by intervening sto bells to 9 knots through the water. It is also incidenta that witness Guralnick's own chart (Lib. Exh. B) sup ports the testimony of the "Rotti" witnesses when i is recognized that the chart represents *average* speed (R.T. 304) and not the "Rotti's" terminal speed.

Whether the "Rotti" had slight headway through th water (not over the ground) at collision, or was being swept backwards at a full 3½ knots into buoy No. (R.T. 213) is of virtually no significance with respect t collision liability.

What we submit is significant in this context, is th fact that the District Court accepted the equivocal, specu lative testimony of an expert witness as against the direc testimony of the "Rotti's" pilot and master (whom th Court felt worthy of credit, R.T. 447) even though th "Tuttle" offered no explanation of its failure to produc its ship witnesses who were present at the collision, failure which under the rule of evidence historically ap plied in collision cases, would raise a presumption tha the "Tuttle" witnesses, if produced, would have sup ported the "Rotti's" testimony that the "Rotti" wa dead in the water at the time of collision. *Coyle Line Inc. v. United States* (5 Cir. 1952) 195 F. 2d 737, 741

he Prudence (E.D. Va. 1911) 191 Fed. 993. It is thus ɔundantly clear that the District Court applied an erro-ɛous standard in evaluating the evidence as well as the ıvigation of the "Rotti", and in each aspect of the case ɜst upon the "Rotti" the heavy burden of exonerating ɛrself, rather than applying the proper rule enunciated *United States v. Shaw, Savill & Albion Co.,* (2 Cir. 49) 178 F. 2d 849, that a vessel which has navigated badly as did the "Tuttle" has an unusually heavy ırden of proof to carry in attempting to establish fault the "Rotti".

It is true that the non-chronological manner in which ɔelant-appellee chose to examine pilot Sever at the trial d libelant-appellee's introduction of bits and pieces of position testimony of the "Rotti" witnesses makes it mewhat difficult to follow the chronological sequence the "Rotti" maneuvers with respect to the "Tuttle". ıat libelant-appellee's method of proceeding rendered e record more than ordinarily difficult to use, does not, wever, have the effect of generating evidence of fault ıere no such evidence exists.

CONCLUSION

The basic legal principles when properly applied t this case which, in all material respects, was submitted o uncontroverted evidence of undisputed facts, require tha the interlocutory decree of the District Court be set asid and a new interlocutory decree entered under which th "Tuttle" will bear full financial responsibility for th collision caused by its fault.

Dated, November 20, 1967.

Respectfully submitted,
GRAHAM & JAMES
FRANCIS L. TETREAULT
JOHN A. EDGINTON
Attorneys for Appellant
N. V. Stoomvaart Maatschappi
"Nederland".

CERTIFICATE

I certify that, in connection with the preparation o this brief, I have examined Rules 18, 19 and 39 of th United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in ful compliance with those rules.

FRANCIS L. TETREAULT

(Appendices Follow)

Appendices.

Appendix I

LIST OF EXHIBITS

(Pursuant to Rule 18,2(f))

(References are to Reporter's Transcript)

		Identified, Offered and Received in Evidence
elant's Exhibits		
1.	Chart entitled "San Francisco Entrance" with markings by Pilot Sever	6
2.	"Rotti" deck bell book and translation	19
3.	Photograph of radar scope	55
4.	Plotting chart	71
5.	"Rotti" course recorder chart	91
6.	"Rotti" engine room bell book and translation	96
7.	August 29, 1965, statement of Lieutenant Scott B. Wilkes, with four sketches	133
8.	Chart used by witness Maurice Guralnick	272
9.	Photographs of "Tuttle"	288
spondent's Exhibits		
A.	Photograph of radar scope	237
B.	Blurred photograph of "Rotti" wheelhouse	238
C.	Photograph of "Tuttle" taken from "Rotti"	240
D.	Photograph of "Tuttle" taken from "Rotti"	240
E.	Photographic enlargement of "Tuttle's" course recorder chart	338
F.	Photocopy of "Tuttle" engine bell book	338

Appendix II

STATUTES AND RULES INVOLVED

A. Rules in effect at time of collision, August 29, 1965.

SPEED IN FOG

Rule 16 (a) (33 U.S.C. §145n):

"(a) Every vessel, or seaplane when taxi-ing on th water, shall, in fog, mist, falling snow, heavy rainstorm or any other condition similarly restricting visibility, g at a moderate speed, having careful regard to the exis ing circumstances and conditions.

"(b) A power-driven vessel hearing, apparently fo ward of her beam, the fog-signal of a vessel the positio of which is not ascertained, shall, so far as the circum stances of the case admit, stop her engines, and the navigate with caution until danger of collision is ove

NARROW CHANNELS AND BENDS THEREIN

Rule 25 (a) (33 U.S.C. §146i):

"(a) In a narrow channel, every power-driven vesse when proceeding along the course of the channel shal when it is safe and practicable, keep to that side of th fairway or mid-channel which lies on the starboard sid of such vessel.

B. Rules which became effective September 1, 1965.

SPEED IN FOG

Rule 16 (a) (33 U.S.C. §1077):

"(a) Every vessel, or seaplane when taxi-ing on th water, shall, in fog, mist, falling snow, heavy rainstorms

any other condition similarly restricting visibility, go a moderate speed, having careful regard to the exist- circumstances and conditions.

"(b) A power-driven vessel hearing, apparently for- rd of her beam, the fog-signal of a vessel the position which is not ascertained, shall, so far as the circum- nces of the case admit, stop her engines, and then vigate with caution until danger of collision is over.

"(c) A power-driven vessel which detects the pres- ce of another vessel forward of her beam before hear- her fog signal or sighting her visually may take early d substantial action to avoid a close-quarters situa- n, but, if this cannot be avoided, she shall, so far as circumstances of the case admit, stop her engines in oper time to avoid collision and then navigate with ution until danger of collision is over.

ANNEX TO THE RULES

(33 U.S.C. §1094)

commendations on the use of radar information as an aid to avoiding collisions at sea.

"(1) Assumptions made on scanty information may dangerous and should be avoided.

"(2) A vessel navigating with the aid of radar in re- icted visibility must, in compliance with Rule 16(a), at a moderate speed. Information obtained from the e of radar is one of the circumstances to be taken into count when determining moderate speed. In this re- rd it must be recognized that small vessels, small ice- rgs and similar floating objects may be not detected by

radar. Radar indications of one or more vessels in th vicinity may mean that "moderate speed" should b slower than a mariner without radar might consider mod erate in the circumstances.

"(3) When navigating in restricted visibility th radar range and bearing alone do not constitute ascer tainment of the position of the other vessel under Rul 16(b) sufficiently to relieve a vessel of the duty to sto her engines and navigate with caution when a fog signa is heard forward of the beam.

"(4) When action has been taken under Rule 16(c to avoid a close quarters situation, it is essential to mak sure that such action is having the desired effect. Altera tions of course or speed or both are matters as to whic the mariner must be guided by the circumstances of th case.

"(5) Alteration of course alone may be the mos effective action to avoid close quarters provided that:

"(a) There is sufficient sea room.

"(b) It is made in good time.

"(c) It is substantial. A succession of small a terations of course should be avoided.

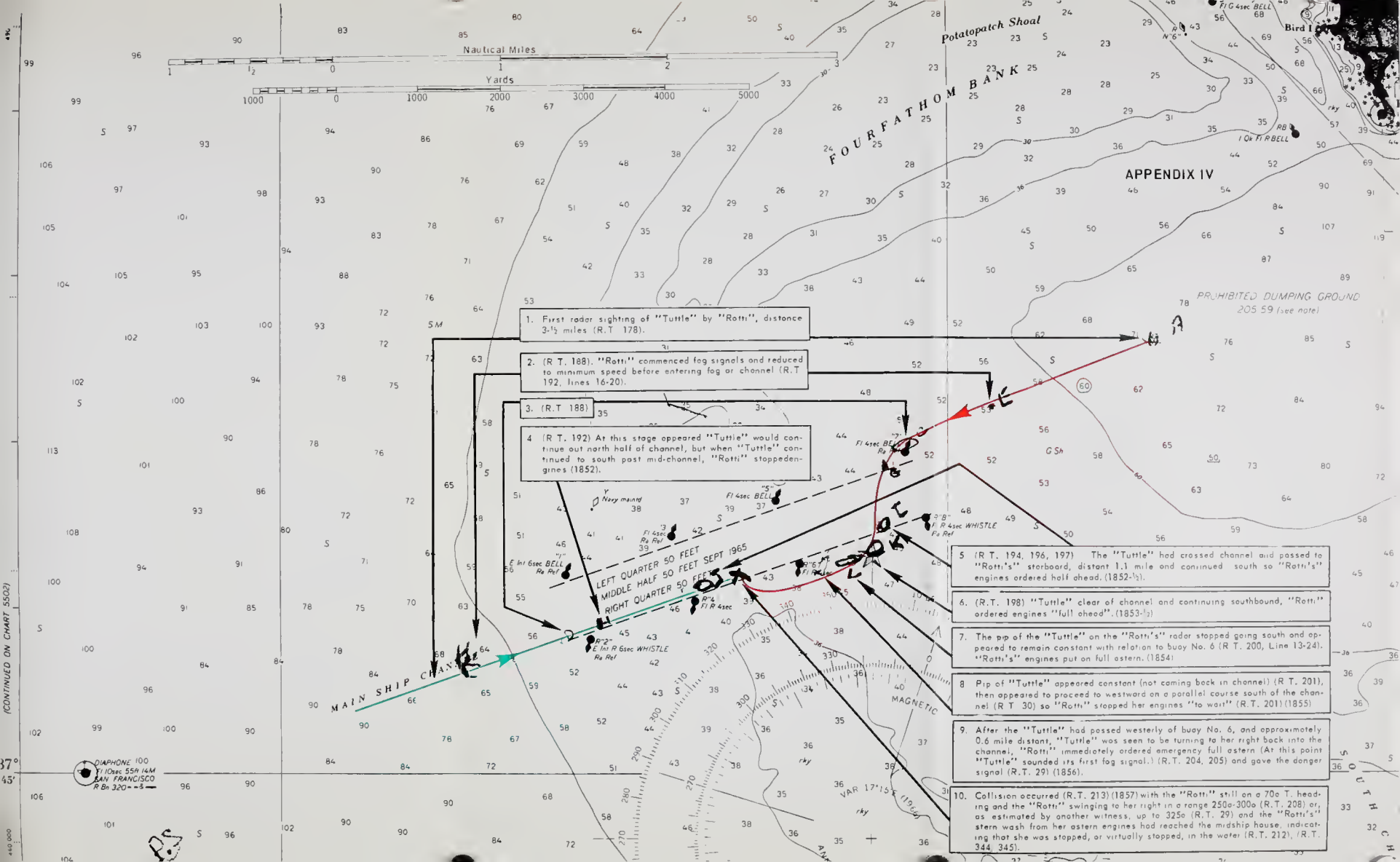
"(d) It does not result in a close quarters situa tion with other vessels.

"(6) The direction of an alteration of course is matter in which the mariner must be guided by the cir cumstances of the case. An alteration to starboard, par ticularly when vessels are approaching apparently o opposite or nearly opposite courses, is generally prefer able to an alteration to port.

‘(7) An alteration of speed, either alone or in con-
ction with an alteration of course, should be substan-
ted. A number of small alterations of speed should
avoided.

‘(8) If a close quarters situation is imminent, the
st prudent action may be to take all way off the
sel.’’


APPENDIX III
FOURFATHOM BANK
PROHIBITED DUMPING GROUND
205.59 (see note)
LEFT QUARTER 50 FEET
MIDDLE HALF 50 FEET SEPT 1965
RIGHT QUARTER 50 FEET
MAIN SHIP CHANNEL
MAGNETIC
VAR 17°15'E (1964)
DIAPHONE 100
Fl 10sec 55ft 14M
SAN FRANCISCO
R Bn 320°-5
Fl 4sec BELL
Ra Ref
E Int 6sec BELL
Ra Ref
Navy mainld
Fl R 4sec WHISTLE
Ra Ref
E Int R 6sec WHISTLE
Ra Ref
Fl R 4sec
Fl 10sec R BELL
rky
SM
SSA
GSA


APPENDIX IV
Nautical Miles
Yards
Potatopatch Shoal
FOURFATHOM BANK
Bird I.
PROHIBITED DUMPING GROUND
205 59 (see note)
1. First radar sighting of "Tuttle" by "Rotti", distance 3-½ miles (R.T 178).
2. (R T. 188). "Rotti" commenced fog signals and reduced to minimum speed before entering fog or channel (R.T 192, lines 16-20).
3. (R.T 188)
4 (R T. 192) At this stage appeared "Tuttle" would continue out north half of channel, but when "Tuttle" continued to south past mid-channel, "Rotti" stoppedengines (1852).
5 (R T. 194, 196, 197) The "Tuttle" had crossed channel and passed to "Rotti's" storboard, distant 1.1 mile and continued south so "Rotti's" engines ordered half ahead. (1852-½).
6. (R.T. 198) "Tuttle" clear of channel and continuing southbound, "Rotti" ordered engines "full ahead". (1853-½)
7. The pip of the "Tuttle" on the "Rotti's" radar stopped going south and appeared to remain constant with relation to buoy No. 6 (R T. 200, Line 13-24). "Rotti's" engines put on full astern. (1854)
8 Pip of "Tuttle" appeared constant (not coming back in channel) (R T. 201), then appeared to proceed to westward on a parallel course south of the channel (R T 30) so "Rotti" stopped her engines "to wait" (R.T. 201) (1855)
9. After the "Tuttle" had passed westerly of buoy No. 6, and approximately 0.6 mile distant, "Tuttle" was seen to be turning to her right back into the channel, "Rotti" immediately ordered emergency full astern (At this point "Tuttle" sounded its first fog signal.) (R.T. 204, 205) and gave the danger signal (R.T. 29) (1856).
10. Collision occurred (R.T. 213) (1857) with the "Rotti" still on a 70o T. heading and the "Rotti" swinging to her right in a range 250o-300o (R.T. 208) or, as estimated by another witness, up to 325o (R.T. 29) and the "Rotti's" stern wash from her astern engines had reached the midship house, indicating that she was stopped, or virtually stopped, in the water (R.T. 212), (R.T. 344, 345).
LEFT QUARTER 50 FEET
MIDDLE HALF 50 FEET SEPT 1965
RIGHT QUARTER 50 FEET
MAIN SHIP CHANNEL
MAGNETIC
VAR 17°15'E (1956)
DIAPHONE 100
Fl 10sec 55ft 14M
SAN FRANCISCO
R Bn 320°-3
(CONTINUED ON CHART 5502)